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SUPREME COURT U.S.

No. 06-317

IN THE

Supreme Court of the United States

BEATRICE ROSARIO,

Petitioner,

v.

KEN CREST SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF PETITIONER

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RESPONSE TO QUESTION PRESENTED FOR REVIEW

The Petitioner recites the facts, issues, and analysis as originally set forth in her Writ for Certiorari.

Contrary to the Employer's allegations, the Petitioner has met her burden of proof of demonstrating the compelling need for this Honorable Court to resolve a conflict of the burden of proof in discrimination cases. Of course, such an important issue such as discrimination must be applied similarly among the Circuit Courts. Unfortunately, the Third Circuit misapplied the standard, and thus, the Writ must be granted.

TABLE OF CONTENTS

Response to Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statement of Case and Facts 1

Argument in Support of Writ of Certiorari 2

I. The Lower Courts Deviated From Supreme Court Cases and Fractured The Burden of Proof In A Wrongful Termination Case And Wrongfully Granted The Employer's Motion For Summary Judgment Even Though There Existed Material Issues Of Disputed Facts As to The Employer's Non-Discriminatory Legitimate Purpose Of Terminating Petitioner That Should Have Been Resolved By A Trier Of Fact Resulting In A Violation Of Her Due Process Rights. 8

Conclusion 7

TABLE OF AUTHORITIES

Cases

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).....2, 3, 4, 5

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).....4

Scott v. County of Ramsey, 180 F.3d 913 (1999) 6

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981).....5

STATEMENT OF CASE AND FACTS

The Petitioner restates the Statement of Case and Facts as originally set forth in the Writ for Certiorari.

Also, the Petitioner urges this Court to appreciate the argument that since the Petitioner's descent was "African" that she received disparate treatment. The Employer cites one witness to the incident who was discredited by other witnesses. The Petitioner suggests that the case was not ripe for summary judgment given the Employer's improper practices and non-legitimate purpose in terminating the Petitioner. Once the Petitioner met her burden of proof, then the Employer was suppose to tender a non-discriminatory purpose which, given the overwhelming evidence, it failed to do so. Even though the Employer suggested that the Petitioner mistreated a patient, the evidence suggested otherwise.

Thus, at the summary judgment stage, where inferences are to be in the Petitioner's favor, the circumstantial and direct evidence should have weighed in the Petitioner's favor and summary judgment denied.

By misapplying the shifts in the burden of proof, the Third Circuit deviated from the applicable standard. Therefore, this Writ must be granted to clarify the "amount" of evidence necessary to provide the discriminatory practices and legitimate non-discriminatory practices.

ARGUMENT IN SUPPORT OF WRIT FOR CERTIORARI

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE BURDEN OF PROOF IN A WRONGFUL TERMINATION CASE AND WRONGFULLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT EVEN THOUGH THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS AS TO THE EMPLOYER'S NON-DISCRIMINATORY LEGITIMATE PURPOSE OF TERMINATING PETITIONER THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT RESULTING IN A VIOLATION OF HER DUE PROCESS RIGHTS.

The basis of the Employer's claim is that the Petitioner failed to meet the fourth prong of the *McDonnell Douglas* framework. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established that in order to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the Petitioner must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the em-

ployer continued to seek applicants from persons of the plaintiff's qualifications.

The courts failed to give credence that Petitioner was harassed by two coworkers and questioned her financial status. But the Employer as well as the lower courts failed to give credence that the Petitioner was not just treated differently because she was black, but that she was of African descent.

In its brief, the Employer attempts to emphasize all of the minorities it employs. However, once again, the Employer failed to address the pattern of behavior of treating African-descent employees different than blacks born in America. Petitioner wanted to be referred to as an American since obviously at the workplace being "African" was not a compliment. Even though there were other Africans who worked with the Employer, Petitioner was discharged because she was Liberian. She was not born in the United States, and thus, treated and regarded different than the African-Americans. Nonetheless, such pattern of behavior that the Employer allowed was sufficient to create a pattern of behavior and a genuine issue of material fact to overcome summary judgment.

Furthermore, contrary to the Employer's allegations, the Petitioner used circumstantial evidence to meet the elements of the *McDonnell* test. All of the inferences must be weighed in the Petitioner's favor. The Employer is attempting to avoid having the burden shifted to itself since it has never provided a legitimate non-discriminatory purpose to defend its acts in terminating the Petitioner.

The Employer based its decision on a patient issue, but the overwhelming evidence suggested that the incident did not occur. Without a legitimate reason, the burden never shifts back to the Petitioner.

At minimum, the inferences from the facts and evidence should have been weighed in the Petitioner's favor and summary judgment denied. In our facts, trialworthy disputed material facts existed, that is, whether the incident actually occurred and whether her termination was based upon discriminatory practices.

Moreover, the Employer simplified the holding in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). Under *Reeves*, once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

The Employer failed to provide this evidence to justify termination. The alleged patient incident was at most circumstantial. The allegations regarding the incident should have been weighed in the Petitioner's favor and summary judgment denied.

Contrary to the lower courts' decisions, Petitioner met the four prong test under *McDonnell Douglas,* including the fourth prong. Circumstances of her termination raised an inference of discrimination. There was conflicting evidence of whether an incident even occurred, and Petitioner was denied promotions on two occasions. The Employer's discriminatory practice was not against blacks, but where they were born, that is either America or Africa.

The Third Circuit and District Court deviated from applicable law and created a conflict among the Circuits by misapplying the burden test. In our facts, there was no legitimate non-discriminatory reason for taking the action. The Employer had misleading and false statements to respond to the discrimination allegations. There was no conclusive evidence or proof, just mere allegations. Instead, Petitioner submitted evidence of satisfactory and exceptional performance appraisals. It was a trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation. Petitioner was entitled to the inference that she had met the fourth prong of the *McDonnell Douglas* analysis.

Moreover, the Circuit Court deviated from other Circuits by accepting the Employer's explanation without any further investigation or evaluation. The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Of course, in our facts, the Employer submitted unsubstantiated allegations.

Even if the burden shifted back to the Petitioner, then she still overcame summary judgment by inferences of pretext discrimination. The Third Circuit and District Court never considered whether a discriminatory pattern could be among "American" versus "African" blacks. The lower courts never even opined whether there could be discrimination within a certain protected class under Title VII.

When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999). As evidenced in the facts, Petitioner received disparate treatment since she was African and the overwhelming circumstantial evidence supports her claims of discrimination.

The lower courts clearly failed to analyze the proper burdens of proof at each level. Since inferences were to be rendered in the Petitioner's favor, then summary judgment should have been denied.

CONCLUSION

The District Court of Pennsylvania and the Third Circuit Court of Appeals have placed a high burden of proof upon the Petitioner to overcome the minimum requirement to prove discrimination in deviation of applicable case law as well as against public policy. Moreover, the lower courts fractured the burden of proof process by failing to enforce the Employer to provide a non-discriminatory legitimate purpose in terminating the Petitioner. The Court should grant *certiorari* to review these important matters and prevent proper discrimination cases to be disposed of on summary judgment.

Respectfully submitted,

Beatrice Rosario, Pro-se